No. 17-1026

In The
Supreme Court of the United States

GILBERTO GARZA JR.,
Petitioner,

v.

STATE OF IDAHO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF IDAHO

BRIEF OF *AMICUS CURIAE*
THE ETHICS BUREAU AT YALE
IN SUPPORT OF PETITIONER

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CONSENT TO FILE AS *AMICUS CURIAE*

Pursuant to Rule 37, this brief is filed with the consent of the parties. The brief is submitted by the Ethics Bureau at Yale in support of Petitioner. Letters of consent from both parties to this appeal have been lodged with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Ethics Bureau at Yale[1] is a clinic composed of sixteen law school students supervised by an experienced practicing lawyer, lecturer, and ethics teacher. The Bureau has drafted amicus briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Because this case implicates a lawyer's ethical obligations to obey his client's objectives during the course of the representation, the Bureau believes it

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[1] The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amicus Curiae* has made a monetary contribution to the preparation and submission of this brief.

might assist the Court in resolving the important issues presented.

SUMMARY OF ARGUMENT

This case implicates an important question that has divided lower courts for over a decade: whether when a defendant asks his lawyer to file an appeal and the lawyer fails to do so because the defendant signed an appeal waiver as part of a plea agreement, a court should presume that the defendant was prejudiced by his counsel's conduct. The majority of lower courts to address the question have presumed prejudice when evaluating ineffective assistance of counsel claims in this context. The court below, however, did not. Because this Court's Sixth Amendment jurisprudence, as well as legal ethics and agency law, make clear that the client retains final control over the decision to appeal, *Amicus* believes that the decision below was wrongly decided and that courts should presume prejudice in these cases.

The facts of this case are straightforward and undisputed. In 2015, Gilberto Garza, Jr. pled guilty separately to aggravated assault and possession of controlled substance. Both plea agreements included an appeal waiver. Mr. Garza subsequently told his lawyer that he wanted to appeal his sentence. But, despite this instruction, his lawyer did not file an appeal because he concluded that "Mr. Garza [had] received the sentence(s) he bargained for" and that "an appeal was problematic because [Mr. Garza] waived his right to appeal." Pet. App. 52a. Mr. Garza filed a pro se petition for post-conviction relief alleging that his counsel rendered ineffective

assistance of counsel by refusing to file to a notice of appeal at his request. The Supreme Court of Idaho affirmed the District Court's and Court of Appeals' denial of relief.

The Constitution, the ethical code of the Idaho Supreme Court, and the common law vest the decision to file an appeal in the client. This rule reflects the fundamental precept that the client, not the lawyer, has the final say over the objectives of a representation. This Court has already concluded that courts should presume prejudice when a lawyer fails to file a notice of appeal at the request of his client. *See Rodriquez v. United States*, 395 U.S. 327 (1969). That presumption applies no less in cases in which a lawyer believes that an appeal would be frivolous. The Constitution and basic tenets of legal ethics and agency law protect a defendant's right to file an appeal that non-judicial actors deem frivolous. *See Anders v. California*, 386 U.S. 738, 744 (1967). And because appellate waivers bar only a subset of potential appeals, it is essential that a court review the merits of a claim.

This case also represents an assault on the fundamental role of courts and defense lawyers in our criminal justice system. The decision below would usurp from courts the ability to conduct an independent review of the merits of an appeal, upending the traditional division of authority in the courtroom—where lawyers serve as advocates and judges as final arbiters. In effect, it "confers upon [actors] outside the judicial system power to take from an indigent all hope of any appeal at all." *Lane v. Brown*, 372 U.S. 477, 485 (1963). Furthermore, the

current disagreement among lower courts regarding the proper division of authority in this context has left defense lawyers deeply confused as to their responsibility under the Sixth Amendment to file appeals that plea agreements appear to bar.

In light of these considerations, *Amicus* urges this Court to grant certiorari and reverse the judgment of the court below.

ARGUMENT

I. Criminal Defendants Have a Right to Counsel Who Will File a Notice of Appeal on Their Behalf.

The client, not the lawyer, has the authority to decide whether to appeal a case. This Court has held that, under the Sixth Amendment, it is ineffective assistance of counsel for a lawyer to refuse to file a requested appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 476-77 (2000). Principles of legal ethics and agency law likewise specify that the decision to appeal is under the client's sole control. These authorities make clear that the client retains control over the decision to appeal even when counsel believes that the appeal might be frivolous. In reliance on this well-established understanding of the attorney-client relationship, defendants entrust their lawyers to carry out their instructions. Thus, when a lawyer fails to file a requested appeal, the lawyer violates the Constitution and fundamental principles of legal ethics and agency law.

A. Fundamental Principles of Constitutional Law, Legal Ethics, and Agency Law Vest the Final Decision to Appeal in the Client.

The defendant's right to appeal is central to the protections provided by the Sixth Amendment. This Court has held that the Sixth Amendment guarantees defendants effective assistance of counsel, and that a lawyer who ignores his client's instructions to file an appeal is presumed to have rendered ineffective assistance. *See Flores-Ortega*, 528 U.S. at 477. This clear delineation of authority is critical because a lawyer who fails to file a requested appeal does not merely neglect his professional duty, but also deals his client "the serious denial of the entire judicial proceeding itself." *Id.* at 483. Indeed, this Court has gone even farther, ruling that counsel must not only perform the simple task of filing a notice of appeal, but must also "act[] in the role of an active advocate in behalf of his client," a role which "requires that he support his client's appeal to the best of his ability." *Anders v. California*, 386 U.S. at 744. As a consequence, a defendant whose lawyer fails to file a requested appeal is entitled to a new appeal without demonstrating that it would likely have been successful. *See Rodriquez*, 395 U.S. at 330.

The defendant's right to decide whether to appeal his case is a vital procedural protection. Most significantly, ignoring a client's express decision to appeal is "professionally unreasonable . . . because a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, 528 U.S. at 477. Defendants whose lawyers ignore their instructions are often left

to file "petitions for relief from time limitations on filing appeals or . . . postconviction collateral attacks on the ground of inadequate representation." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (3d ed. 1993). Moreover, many of these defendants, like Mr. Garza, will be forced to make these claims pro se. As this Court wrote when it recognized the right to counsel for a first appeal, "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." *Douglas v. California*, 372 U.S. 353, 357 (1963). Defendants rely on counsel to pursue their objectives. To allow lawyers to do otherwise would undermine the sanctity of the attorney-client relationship and defendants' Sixth Amendment rights.

Principles of legal ethics and agency law likewise prescribe that, throughout the course of a representation, clients retain control over final decisions and, specifically, the decision to appeal.[2] The American Bar Association, for example, has made clear that "[t]he decision whether to appeal must be the defendant's own choice." ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2(a) (3d ed. 1993); *see also id.*

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[2] This Court has previously looked to national ethical standards in construing constitutional requirements. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 167 (1986) (citing to common understandings of professional ethics in construing lawyers' Sixth Amendment duties when a client plans to present perjured testimony at trial). Principles of agency law have often been used to illuminate a lawyer's duties in the course of representation. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Holland v. Florida*, 560 U.S. 631, 659-60 (2010) (Alito, J., concurring).

4-8.2(b) ("Defense counsel should take whatever steps are necessary to protect the defendant's rights of appeal."); *id.* 4-5.2(a)(v) (noting that "[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel," and providing that the decisions to be made by defendants include "whether to appeal"). The Restatement of Law Governing Lawyers likewise states that the decision to appeal a criminal prosecution is reserved to the client. *See* Restatement (Third) of the Law Governing Lawyers § 22(1) (Am. Law Inst. 2000).

This assignment of authority reflects broader principles of agency law and legal ethics which give the client control over final decisions. It is well-established under the common law that lawyers are their clients' agents. *See C.I.R. v. Banks*, 543 U.S. 426, 436 (2005) (describing the attorney-client relationship as "a quintessential principal-agent relationship"). A lawyer remains at all times bound to respect his client's fundamental wishes regarding the objectives of the representation. *See* Restatement (Third) of Agency § 8.09(2) (Am. Law Inst. 2006) ("An agent has a duty to comply with all lawful instructions received from the principal . . . ."); *see also Faretta v. California*, 422 U.S. 806, 820 (1975) ("[The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."). The Restatement of Law Governing Lawyers and the Model Rules of Professional Conduct[3] likewise assign the authority to define the objectives of the representation to the client. *See*

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[3] The Idaho Rules of Professional Conduct follow the Model Rules in all relevant respects.

Restatement (Third) of the Law Governing Lawyers § 21; Model Rules of Prof'l Conduct r. 1.2(a) (Am. Bar Ass'n 1983). In keeping with these broader principles, the law assigns the decision whether to appeal—an objective of the representation—to the client.

In this case, Mr. Garza clearly conveyed that he wanted to appeal his case, and his lawyer violated the Sixth Amendment as well as principles of legal ethics and agency law when his lawyer disregarded that direction. Mr. Garza's lawyer acknowledged that Mr. Garza instructed him to file an appeal in his affidavit in the District Court. *See* Pet. App. 52a. Once Mr. Garza established as one of his objectives to appeal, his lawyer should not have deviated from that objective. Defense counsel's failure to carry out his professional obligations forced Mr. Garza to petition, initially pro se, to regain his right to appeal—a right that his lawyer had given up against his wishes. A lawyer who puts his client in such a position has acted in a way that is "professionally unreasonable." *Flores-Ortega*, 528 U.S. at 477.

B. Counsel Are Required To File a Notice of Appeal Even When They Fail To Identify Any Appealable Issues.

This Court has recognized a tension between the constitutional right of defendants to have an active advocate on appeal and the professional obligation of counsel not to file frivolous appeals. *See McCoy v. Court of Appeals of Wisconsin, Dist. 1*, 486 U.S. 429, 437 (1988). But in reconciling this tension, this Court has not wavered from the principle that defendants have a right to file an appeal and to the

effective assistance of counsel in doing so. Instead, it has addressed the problem of frivolous appeals by recommending that lawyers follow the procedure described in *Anders v. California*. That is, when a client asks his lawyer to file an arguably frivolous appeal, the lawyer should file a notice of appeal, submit "a brief referring to anything in the record that might arguably support the appeal," and request permission to withdraw. *Anders*, 386 U.S. at 744. This procedure, requiring lawyers to file "*Anders* briefs," allows defense counsel to act "with honor and without conflict," *id.*, but even more importantly, it preserves defendants' right to appeal.

Principles of legal ethics strike a similar balance between defendants' constitutional right to counsel and lawyers' professional obligation not to file frivolous appeals. As a general rule, counsel may not file frivolous arguments. *See* Model Rules of Prof'l Conduct r. 3.1; Restatement (Third) of the Law Governing Lawyers § 110(1). But lawyers' professional obligations "are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim that otherwise would be prohibited." Model Rules of Prof'l Conduct r. 3.1; *see also* Restatement (Third) of the Law Governing Lawyers § 110 cmt. f ("[A] lawyer representing a convicted person on appeal may be required to file a so-called *Anders* brief in the event the lawyer concludes that there is no nonfrivolous ground on which the appeal can be maintained."). The ethical rules governing lawyers' conduct likewise draw an important distinction between assisting a client on appeal—which is constitutionally required—and

actively deceiving the court or opposing parties—which is prohibited. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3(c).

Requiring lawyers to abide by their clients' wishes and file an appeal serves a number of vital interests. Most importantly, these procedures preserve defendants' right to appeal. As this Court has noted, "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, 528 U.S. at 477. Without a rule ensuring that counsel file such a notice, a defendant may lose his right to any form of appellate review.

These procedures also improve the process by which appeals go forward. *Anders* briefs, for example, "'provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability'" and also "provide[] an independent inducement to counsel to perform a diligent review" of the case. *Penson v. Ohio*, 488 U.S. 75, 81, 82 & n.4 (1988) (quoting *McCoy*, 486 U.S. at 439). This review by both counsel and the court is essential even in the appeal waiver context because a valid waiver does not automatically preclude a defendant from challenging the sentence or conviction, for example, when the appeal goes "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Blackledge v. Perry*, 417 U.S. 21, 30 (1974) (vindictive prosecution); *see Menna v. New York*, 423 U.S. 62 (1975) (double jeopardy); *see also United States v.*

Marin, 961 F.2d 493, 496 (4th Cir. 1992) (use of a "constitutionally impermissible factor such as race" at sentencing). It is also important to note that the timing for filing a notice of appeal is often extremely short, which suggests that lawyers should not foreclose the possibility of a meritous appeal at this stage. Cursory review does not satisfy a defendant's right to effective counsel and may lead to additional postconviction collateral claims. *See* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.2 cmt.

This case implicates a particularly stark set of facts. Here, Mr. Garza's lawyer not only offered a "conclusory statement that the appeal was meritless," *McCoy*, 486 U.S. at 443, but also never presented this conclusory statement to a court for further review. *See Smith v. Robbins*, 528 U.S. 259, 281 (2000) (noting that a "flaw with the procedures" in past cases "was that there was only one tier of review"). Instead, defense counsel simply concluded that "Mr. Garza received the sentence(s) he bargained for" and told Mr. Garza "that the appeal was problematic because he waived his right to appeal" in his plea agreement. Pet. App. at 52a.

The conclusory statement by Mr. Garza's lawyer does not satisfy the Sixth Amendment right to counsel. Instead, it is unclear whether Mr. Garza's lawyer "diligently investigated the possible grounds of appeal." *Anders*, 386 U.S. at 742. And even if he had conducted a more diligent investigation, Mr. Garza's lawyer would still not have had the unilateral authority to waive his client's right to appeal. As the preceding Section made clear, the Constitution and

rules of legal ethics vest the final decision to appeal in the defendant. Any decision that vests the authority in the lawyers can "not meet constitutional standards." *Lane*, 372 U.S. at 485.

II. This Court Should Grant Certiorari To Preserve the Role of Courts as the Final Arbiter of Appeals.

Whether an appeal raises any non-frivolous issues is a decision for the appellate court—not defense counsel—to make. When a lawyer fails to file a requested appeal, that disobedience not only undermines the client's right to decide whether to appeal, but also usurps the authority of the court to decide the merits of the appeal. Direct appellate review is entirely eliminated. Thus, in addition to safeguarding the fundamental rights of criminal defendants, the procedures set forth in *Anders* protect important judicial interests.

First, effective defense counsel must be required to file a notice of appeal so that appellate courts retain their role as neutral decision makers. The ethical rules governing the conduct of legal actors divide authority between counsel and courts, and ultimately courts are supposed to decide whether appeals are meritorious. *See* Model Code of Judicial Conduct r. 2.5-2.7 (Am. Bar Ass'n 1990); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 223 (2005). In *Anders*, this Court stated that counsel must "support his client's appeal to the best of his ability," and then the *court* must conduct "a full examination of all the proceedings, to decide whether the case is

wholly frivolous." *Anders*, 386 U.S. at 744. This proper division of labor in the courtroom helps to advance the ethical duties of both judges and lawyers.

One of defense counsel's most critical roles is that of an advocate. Accordingly, lawyers not only lack the authority to determine if an appeal should be granted, but would violate the duty of loyalty owed to their clients by exercising such authority. The Model Rules of Professional Conduct provide that, as advocates, lawyers must "zealously assert[] the client's position under the rules of the adversary system." Model Rules of Prof'l Conduct pmbl.; *see also* Model Rules of Prof'l Conduct r. 1.7 cmt. 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."). As this Court has held, while an effective "attorney need not advance *every* argument, regardless of merit, urged by the appellant," counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

The judge, rather than defense counsel, is charged with providing this "detached evaluation." It is the unique role of judges to decide the merits of the cases that come before them. *See* Model Code of Judicial Conduct r. 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."). The most fundamental "role [of] a court is as arbiter of the interests of Government and accused." *Suggs v. United States*, 391 F.2d 971, 975 (D.C. Cir. 1968). Thus, *Anders* was meant to ensure that appellate judges "successfully and constitutionally perform that function" by

"consider[ing] a presentation devoted to arguments for the accused, leaving it to [the court] to determine whether and to what extent they have merit." *Id.* In this case, however, when Mr. Garza's lawyer failed to file a notice of appeal, he unilaterally appointed himself to preside over his own client's appeal—and then proceeded to do so in direct contravention of Mr. Garza's interests. *See* Jacob Szewczyk, Comment, *Following Orders:* Campbell v. United States, *The Waiver of Appellate Rights, and the Duty of Counsel*, 64 Cath. U. L. Rev. 489, 512 (2015).

Anders briefs, moreover, ensure that courts carry out their role competently by directing reviewing judges to those parts of the record that might arguably support the appeal. *See McCoy*, 486 U.S. at 442; Model Code of Judicial Conduct r. 2.5(A) (obligating judges to perform their duties "competently and diligently"). In *Anders*, this Court established a procedure that would allow defense counsel to ethically provide adequate "assistance to his client *and to the court*." *Anders*, 386 U.S. at 744 (emphasis added). Without the effective assistance of counsel, an appeal might devolve into a "meaningless ritual," since, for virtually any layperson, "the services of a lawyer will . . . be necessary to present an appeal in a form suitable for appellate consideration on the merits." *Evitts*, 469 U.S. at 393-94 (quoting *Douglas*, 372 U.S. at 358). *Anders* briefs, therefore, serve the "valuable purpose of assisting the court" in competently determining both whether "counsel in fact conducted the required detailed review of the case" and whether "the appeal is indeed so frivolous that it may be decided without an adversary presentation." *Penson*, 488 U.S. at 81-82

(1988); *see also Anders*, 386 U.S. at 745. *Cf.* ABA Standards for Criminal Justice Prosecution Function and Defense Function Standard 4-8.3 cmt. (noting that it "is also in the public interest" to expeditiously obtain complete and final determinations of all cases).

Lastly, without a notice of appeal, judges may not reliably fulfill their duty to protect the legitimacy of the legal system. The First Canon of the Model Code of Judicial Conduct states that judges, as the final arbiters of every case over which they preside, "shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety." Model Code of Judicial Conduct Canon 1. The proper division of responsibility between judges and lawyers on appeal is one way for courts to protect their "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988); *see also Offutt v. United States*, 348 U.S. 11, 14 (1954) ("Justice must not only be done, it must appear to be done."). Moreover, this judicial duty is especially important in the plea bargaining context. For, today, plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Symposium: Punishment, Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)).

When lawyers fail to file notices of appeal, courts simply cannot guarantee defendants an

"adequate and effective" appeal. *Griffin v. Illinois*, 351 U.S. 12, 20 (1956). Appellate judges are rendered powerless, incapable of guarding against the accidental waiver of viable claims by defense lawyers. As a result, the very purpose of systems of appeal as of right—to "assure that only those who are validly convicted have their freedom drastically curtailed"—are dangerously undercut. *Evitts*, 469 U.S. at 400. The judiciary has a duty to protect every individual defendant's fundamental rights and, in turn, to uphold the integrity of the legal system writ large.

III. The Decision Below Creates Needless Confusion and Uncertainty for Criminal Defense Lawyers.

The decision below reflects a longstanding split of authority regarding a criminal defense lawyer's duty to file an appeal in the post-waiver context. Criminal defense lawyers remain unsure of their legal and ethical duties when faced with plea bargains that include appellate waivers. Moreover, this issue comes up frequently, due in part to the pervasiveness of plea bargaining. The overwhelming majority of criminal cases are resolved through plea bargaining negotiations. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

The prevalence of plea bargaining only amplifies the need for clarification in this case. *See* Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. Times (July 16, 2012), http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html. Since the

Sentencing Reform Act of 1984, appellate waivers have only increased in popularity with judges and prosecutors' offices around the country. *See* Lauren Gregorcyk, Note, *A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation*, 20 Wash. & Lee J. Civil Rts. & Soc. Just. 141, 147-148 (2013).

The current disagreement among lower courts has fostered significant uncertainty for criminal defense lawyers. The decision below only adds to the confusion. Lawyers need to know not only whether filing a notice of appeal in this context is frivolous, but also whether it is constitutionally required. Asking criminal defense lawyers to sift through inconsistent or contradictory standards notably jeopardizes the ability of defense lawyers to perform as competent counsel. Indeed, the current split of authority has resulted in an anomalous state of affairs in which lawyers in some states—such as in Idaho—may be subject to one constitutional standard in state court and another in federal court. *Compare Garza v. State*, 405 P.3d 576 (Idaho 2017), *with United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005).

In addition, criminal defense lawyers have a personal interest in understanding the law regarding ineffective assistance of counsel because being found "ineffective" directly affects their professional standing. *See* Joel Cohen, *When Lawyers Admit "Ineffectiveness,"* N.Y.L.J. (Apr. 13, 2010), https://www.stroock.com/siteFiles/Pub918.pdf ("There is nothing worse for a criminal lawyer than personal guilt for having waged an inadequate defense that results in a miscarriage of justice for his

client."). In deciding to file an appeal in the post-waiver context, criminal defense lawyers might worry that they must choose whether to pursue their clients' interests or to follow a more convenient or professionally beneficial course. In short, the current split of authority leaves criminal defense lawyers in the dark as to whether their decision to file an appeal from a plea agreement containing an appeal waiver might amount to ineffective assistance of counsel. This Court should therefore grant certiorari and clarify the obligations of criminal defense lawyers in this recurrent situation.

CONCLUSION

Criminal defense lawyers should be constitutionally required to file an appeal where directed to do so by their client, even if their client signed a plea agreement containing an appeal waiver. To hold otherwise would undermine the right to effective assistance of counsel under the Sixth Amendment, fundamental requirements of ethics and agency law, and the traditional division of authority between defense lawyers and courts in the criminal justice system. Further, defense counsel should know the scope of their duty to file an appeal so that they are able to both protect their clients' constitutional rights and avoid compromising their professional standing. Defendants, not their counsel, should have the ultimate authority to choose to appeal. For these reasons, *Amicus* urges this Court to grant certiorari and reverse the judgment below.

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In the

Supreme Court of the United States

GILBERTO GARZA JR.,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BRIEF OF AMICUS CURIAE IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Established in 1989, the Idaho Association of Criminal Defense Lawyers (IACDL) is a non-profit, voluntary organization of attorneys. Currently, IACDL has over 400 lawyer members, all of whom practice criminal defense. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal court, and attorneys who focus on trials, appeals, post-conviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially those who cannot afford to retain counsel. For those reasons, IACDL has a strong commitment to ensure that Idaho defendants receive adequate assistance of counsel at trial, and that they are able to fully effectuate their right to an appeal.

Furthermore, given the size and breadth of IACDL's membership, the organization has substantial expertise in the practical circumstances on the ground in Idaho regarding how defense attorneys, their clients, and courts operate. IACDL likewise has insight into how each of those actors deals with the issues implicated by the case at bar, i.e., plea agreements, waivers of appellate rights, notices of appeal, and ineffective-assistance claims. Accordingly, IACDL has both the interest and the knowledge to assist the Court with its resolution of the petition for certiorari.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received 10 days' notice of the filing of this brief and provided written consent to its filing.

REASONS FOR GRANTING THE WRIT

IACDL agrees fully with the contentions made in the Petition for a Writ of Certiorari and offers the additional points below in support of Petitioner.

I. THE QUESTION PRESENTED IS IMPORTANT.

In addition to the acknowledged circuit split, (Pet. 8-9), the Question Presented is especially important because it involves a defendant deprived of a "proceeding itself" and arises frequently.

First, this Court has repeatedly protected the rights of individuals who have forfeited a judicial proceeding due to the decisions or performance of their attorney. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000). In *Flores-Ortega*, this Court described the distinction, based on a long line of case law, between ineffective assistance that merely causes "a judicial proceeding of disputed reliability" and ineffective assistance that causes "the forfeiture of a proceeding itself." 528 U.S. at 483 (citing *Smith v. Robbins*, 528 U.S. 259 (2000); *Penson v. Ohio*, 488 U.S. 75 (1988); *United States v. Cronic*, 466 U.S. 648 (1984)).

This Court held, "[W]hen counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Flores-Ortega*, 528 U.S. at 484. Courts should presume prejudice "with no further showing from the defendant of the merits of his underlying claims when the violation of the right to counsel rendered the proceeding . . . entirely nonexistent." *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 693-96 (1984)).

For more than a decade, Circuit Courts have interpreted *Flores-Ortega* to apply when defendants entered a plea agreement that included an appellate waiver. *See, e.g., Campusano v. United States*, 442 F.3d 770, 774 (2d Cir. 2006) (Sotomayor, J.); *United States v. Garrett*, 402 F.3d 1262, 1265-66 (10th Cir. 2005). For example, the Second Circuit reasoned that "important constitutional rights require some exceptions to the presumptive enforceability of [an appellate] waiver. . . . These constitutional protections are endangered if counsel fails to pursue an appeal without advising a client of the reasons for doing so." *Campusano*, 442 F.3d at 774-75 (citing *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000)). Likewise, the Tenth Circuit reasoned that the presumption of prejudice in post-waiver cases "serves to safeguard important interests with concrete and potentially dispositive consequences which can be guaranteed only by the direct-appeal process and the concomitant right to counsel." *Garrett*, 402 F.3d at 1265-66.

Just last Term, this Court reaffirmed the importance of the *Flores-Ortega* presumption of prejudice where an attorney's "deficient performance arguably led . . . to the forfeiture of a proceeding itself." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (citing *Flores-Ortega*, 528 U.S. at 483). Rejecting the Government's argument that a petitioner seeking to overturn a guilty plea could not show prejudice because he would have been unlikely to succeed at trial, this Court stated that the presumption of reliability in judicial proceedings "has no place where, as here, a defendant was deprived of a proceeding altogether." *Id.* at 1967.

Petitioner here was similarly "deprived of a proceeding altogether," a direct appeal. Because such complete deprivations are so important to ineffective assistance claims under *Strickland*, the Question Presented should be reviewed.

Second, the Question Presented will frequently recur until this Court acts to resolve the issue. The vast majority of criminal convictions follow plea agreements. *See, e.g., Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Moreover, most plea agreements include an appellate waiver. *See, e.g.*, Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 231, 232 fig.7 (2005) (sixty-five percent of plea agreements across the Federal circuits include appellate waivers).

Due to the ubiquity of plea agreements and appellate waivers, some defendants will continue to find themselves in the same position as Petitioner: desiring to appeal after a guilty plea, but with counsel who choose not to file a notice of appeal because of an appellate waiver. Indeed, the Question Presented has arisen with such regularity since *Flores-Ortega* that ten of the federal Circuit Courts have decided it. *See Campbell v. United States*, 686 F.3d 353, 359 (6th Cir. 2012) (surveying cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and concluding that "prevailing precedent from the Supreme Court, the Sixth Circuit, and the majority of our sister circuits mandates that even [after an appellate waiver] a defendant is entitled to counsel who will follow through on express instructions to proceed with an appeal").

Scholarly attention further shows the importance of the Question Presented. *See, e.g.*, Jacob Szewcyzk, Comment, *Following Orders:* Campbell v. United States, *The Waiver of Appellate Rights, and the Duty of Counsel*, 64 Cath. U. L. Rev. 489, 513 (2015) ("holding that defense counsel has provided ineffective assistance of counsel when failing to follow orders from his client to file an appeal, even if his client has waived that right, is the best way to protect defendants' rights and ability to make decisions regarding their own criminal proceedings"); Lauren Gregorcyk, Note, *A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation*, 20 Wash. & Lee J. Civ. Rts. & Soc. Just. 141, 174 (2013) ("appellate waivers should not alter pre-existing obligations between defense attorneys and their clients, like the obligation to file a requested appeal"); King & O'Neill, *supra*, 55 Duke L.J. at 256 ("Appeal waivers are firmly entrenched in plea agreement practice in federal courts.").

In sum, the Question Presented is important and frequently recurring. It is fully developed. It is not going away. It merits this Court's review.

II. APPELLATE WAIVERS RESULT FROM UNEQUAL BARGAINING POWER.

One dubious defense of the minority position is that criminal defendants must live with the deal they have struck, a "freedom of contract" type of argument. *See, e.g.*, Pet. App. 14a ("a plea agreement is a bilateral contract, to which both the State and defendant are bound"). As an initial matter, this argument misunderstands the effect of the bargain that has been struck by the defendant. As Petitioner

explains, a defendant who has signed a plea waiver maintains the right to appeal a number of important constitutional issues. Pet. 10.

The argument also presumes that criminal defendants have significant bargaining power when negotiating a plea agreement. The reality on the ground is quite different. *See, e.g.*, Steven L. Chanenson, *Guidelines from Above and Beyond*, 58 Stan. L. Rev. 175, 182 (2005) ("there is reason to question how much real trading occurs"); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 211 (1995) ("appeal waivers look . . . more like the price of admission to engage in the plea bargaining process at all"); Alexandra W. Remelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. Rev. 871, 904 (2010) (discussing how defendants have little choice but to accept plea agreements); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 Fordham L. Rev. 2011, 2014 (2000) (discounting the notion that the ability to waive appellate rights operates as a bargaining chip).

Plea agreements are akin to contracts of adhesion, which are, as this Court has noted, "form contracts offered on a take-or-leave basis by a party with stronger bargaining power to a party with weaker power." *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991). Prosecutors set the terms of plea agreements and present the fully drafted document to defense counsel, not the other way around. The plea agreements Petitioner entered are good examples, both containing nearly identical terms in what appears to be a sort of fill-in-the-blanks template. *Compare* Pet. App. 40a-45a *with* Pet. App. 46a-50a.

Some courts and commentators have recognized the inherent inequality in bargaining power between prosecutors and defendants. *See United States v. Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997) (describing plea negotiations as "inherently unfair; it is a one-sided contract of adhesion; it will undermine the error correcting function of the courts of appeals in sentencing."). Prosecutors determine the actual charge or charges brought against the defendant, which in turn determine the ultimate sentence that will result from the charges. Remelt, *supra*, 51 B.C. L. Rev. at 888. Prosecutors then create the terms of the plea agreement, and it is up to the defendant to enter into the contract on a *take-it or leave-it* basis. *Id.*

The lack of bargaining power is particularly alarming in the ten states that do not require prosecutors to provide discovery until shortly before trial. *See* Beth Schwarzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, New York Times (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html. In those jurisdictions, prosecutors often plea bargain without having provided information that could potentially be helpful to the defense, including disclosures required by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963); Schwarzapfel, *supra* (noting "lower courts have split over whether *Brady* material must be turned over before a plea").

In short, a criminal defendant's "freedom of contract" should not prevent a presumption of prejudice from arising when counsel fails to file an appeal based on an appeal waiver.

III. REVIEW WILL CLARIFY THE DUTIES OF DEFENSE COUNSEL.

By resolving the question presented, this Court will provide needed clarity to defense attorneys regarding their duty to file a notice of appeal and their related duty to consult with their clients regarding an appeal. First, the minority position allows *attorneys* to decide whether to appeal, not their clients. The State of Idaho argued below, for example, that Petitioner's "appeal waivers negated the duty his trial counsel otherwise would have had to file appeals at his request." Pet. App. 30a. In accepting this argument, the minority position ignores the long-held understanding that it is defendants who make the ultimate decision to appeal. *See, e.g.*, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) ("As a matter of professional ethics, . . . the decision to appeal should turn entirely on the client's interest."); *Flores-Ortega*, 528 U.S. at 479 ("the decision to appeal rests with the defendant"); ABA Criminal Justice Standard 4-5.2(a)(v) ("The decisions which are to be made by the accused after full consultation with counsel include . . . whether to appeal.").

Second, the minority position also allows defense attorneys to neglect their duty to consult with their clients about an appeal. This Court held in *Flores-Ortega* that defense counsel "has a constitutionally imposed duty" to consult with a defendant who has "reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. at 480; *see also id.* at 488 (Breyer, J., concurring) ("in my view . . . counsel does 'almost always' have a constitutional duty to consult with a defendant about an appeal after a trial"). Here, it is apparent that Petitioner's attorney failed to discharge his duty to consult, despite

Petitioner asking him to appeal in "numerous phone calls and letters." Pet. App. 3a; *see also Flores-Ortega*, 528 U.S. at 493-94 (Ginsburg, J., concurring in part and dissenting in part) ("I think it plain that the duty to consult was not satisfied in this case").

The court below misread *Flores-Ortega* as broadly not compelling a presumption of prejudice in the "failure to consult context," Pet. App. 10a, while ignoring this Court's clear holdings that a duty to consult arises when a client has demonstrated an interest in appealing and that a presumption of prejudice *does* arise when counsel's performance "deprives a defendant of an appeal that he otherwise would have taken." 528 U.S. at 484.

Overlooking these duties, the minority position places undue weight on a defense attorney's duty not to file "frivolous" litigation. *See* Pet. App. 13a, 26a. More than a half-century ago, this Court provided a remedy for defense counsel who are asked to file an appeal they believe to be frivolous, in *Anders v. California*, 386 U.S. 738, 744-45 (1967). The solution is not to ignore the client's request to appeal. The court below did not make a single reference to *Anders*. *See* Pet. App. 1a-15a.

Finally, this Court's review will prevent the anomaly, created by the split in courts below, that defense attorneys in the same town have varying duties based on whether they are in state court or federal court. Due to the conflict between the Idaho Supreme Court and the Ninth Circuit, which follows the majority rule, the performance of a Boise attorney in state court is not presumed to be prejudicial if he ignores a client's request to appeal, while in federal court it is. *Compare* Pet. App. 15a ("This Court does

not presume counsel to be automatically ineffective when counsel declines to file an appeal in light of an appeal waiver.") *with United States v. Sandoval-Lopez*, 409 F.3d 1193, 1197 (9th Cir. 2005) (if "it is true that he explicitly told his lawyer to appeal his case and his lawyer refused, then we are required by *Flores-Ortega* to conclude that it was deficient performance not to appeal and that *Sandoval-Lopez* was prejudiced").

Therefore, this Court's review is needed to clarify the constitutional duties of defense counsel related to appellate filing and consultation when their clients' plea agreements contain an appellate waiver.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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